

August 7, 2001

D.T.E. 99-66-B

Investigation by the Department of Telecommunications and Energy on its Own Motion Into
Fitchburg Gas and Electric Light Company's Recovery of Costs Related to Gas Inventory

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FOR: FITCHBURG GAS AND ELECTRIC
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Respondent

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I. INTRODUCTION

On May 31, 2001, the Department of Telecommunications and Energy (“Department”) issued an Order requiring Fitchburg Gas and Electric Light Company (“Fitchburg” or “Company”) to refund through its Cost of Gas Adjustment Clause (“CGAC”) \$675,052 in gas inventory charge expenses improperly collected between 1987 and 1998, plus accumulated interest and future interest on the unamortized balances. Fitchburg Gas and Electric Light Company, D.T.E. 99-66-A at 29-31(2001) (“Order”). Fitchburg was directed to file a proposal for returning these funds to ratepayers within 30 days from the date of the Department’s decision.¹ Order at 30. On June 20, 2001, Fitchburg filed with the Department a Petition and Notice of Appeal to the Supreme Judicial Court.

On June 26, 2001, Fitchburg filed with the Department a motion to stay the enforcement of the Order pending the resolution of the Company’s appeal by the Supreme Judicial Court (“Motion to Stay”). Fitchburg requests that the Department stay any refund to ratepayers until the resolution of the appeal by the Supreme Judicial Court. In the alternative, Fitchburg requests that the Department issue a “temporary” stay of the Order so that the Company can present its request for a stay to the Supreme Judicial Court (id. at 3-4). On July 10, 2001, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed an opposition to the Motion to Stay (“Opposition”).

¹ On June 26, 2001, Fitchburg submitted a compliance proposal as required by the Order (“Proposal”). Fitchburg proposes to return the funds to ratepayers over a 139 month period beginning on November 1, 2001 (Proposal at 1). Fitchburg seeks to return to ratepayers \$675,052 of inventory finance charges, plus accumulated interest, through the Inventory Finance Charge rate component of the CGAC (id.). Because inventory finance costs have been collected from firm sales customers during the peak winter period, the Company recommends refunding these costs to customers in the peak winter period (id.).

II. POSITIONS OF THE PARTIES

Fitchburg argues that the interests of justice require a stay of the Order (id. at 3). As support for its Motion to Stay, the Company requests that the Department consider an accompanying affidavit of Mark H. Collin, treasurer of Fitchburg (“Collin Affidavit”). According to Mr. Collin, the financial impact of the Department’s Order on the Company would result in a refund of \$176,105 over a twelve year period, representing over 50 percent of the average annual net income derived from Fitchburg’s gas operations (Collin Affidavit at 2). Fitchburg argues that, if its appeal is successful, a failure of the Department to stay the Order may prevent the Company from recovering any amounts refunded prior to a final decision by the Supreme Judicial Court (Motion to Stay at 3). Conversely, Fitchburg argues that a stay of the Order will not harm ratepayers because, in the event the Department’s Order is upheld, ratepayers will receive interest on the balance due (id.).

The Attorney General argues that Fitchburg has failed to meet the Department’s requirements for a stay (Opposition at 2). The Attorney General argues that the Company has not shown it is likely to succeed on the merits of an appeal (id. at 2-3). The Attorney General also argues that Fitchburg has not shown it will be irreparably harmed absent a stay because the Company’s calculations of financial effect fail to take income tax consequences into consideration; thereby overstating the impact of the Company’s annual net income (id. 3).² The Attorney General argues that the after-tax effect on income of the estimated annual amount to

² The Attorney General requests that the Department disregard the Collin Affidavit, arguing that it is an improper supplementation of the factual record (Opposition at 3, n.2). In the alternative, the Attorney General requests that the Department consider the accompanying affidavit of Timothy Newhard, a financial analyst with the Attorney General (id.).

be returned by the Company represents less than 5.8 percent of Fitchburg's return on rate base allowed in its last base rate case (Opposition at Att. A, p. 2, citing Fitchburg Gas and Electric Light Company, D.T.E. 98-51 (1998)). Finally, the Attorney General argues that ratepayers will be further harmed by any delay in the refund given the recent sharp rises in energy costs and the "ebb and flow" of customers from the Company's service area (id. at 4).

III. STANDARD OF REVIEW

Neither the enabling statutes nor the Department's procedural rules provide explicitly for a stay pending reconsideration of a Department order. The Department may grant a stay pending judicial appeal of a Department order in two circumstances. In the first circumstance, the Department takes the following factors into account: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. Boston Edison Company, D.P.U. 92-130-A at 7, n.7 (1993); Appeal of Robert K.M. Lynch, D.P.U. 88-203-A at 5 (1990). The second circumstance occurs when: (1) the consequences of adjudicatory decisions are far-reaching; (2) the immediate impact upon the parties in a novel and complex case is substantial; or (3) significant legal issues are involved. Stow Municipal Electric Department, D.P.U. 94-176-A at 2 (1996).

IV. ANALYSIS AND FINDINGS

In determining the likelihood of Fitchburg's success on the merits of its appeal, we cannot determine whether the Company has made out a substantial case on the merits since no appeal has yet been filed. However, in D.T.E. 99-66-A, we fully considered all of Fitchburg's arguments and found that Fitchburg improperly collected gas inventory finance charges through

its CGAC. D.T.E. 99-66-A, at 23. In the present motion, the Company has presented no arguments or information that would require us to change our conclusion. Therefore, we find that there is no substantial likelihood that Fitchburg will prevail on the merits of an appeal of D.T.E. 99-66-A.

Regarding the harm to the Company if the stay is not granted, Fitchburg raises the effect of the refund on its annual net income available to common shareholders of the Company (Motion to Stay at 3). Fitchburg also argues that it may be harmed if principles of retroactive ratemaking prevent the Company from recovering any amounts refunded prior to a decision of the Supreme Judicial Court on its appeal (*id.*). In determining the appropriate amortization period over which to refund the improperly collected amounts, the Department has already considered and minimized the financial effect on the Company. Order at 28-29. After review of factors such as the amount of the refund, the value of such an amount to ratepayers based on certain amortization periods, and the effect of the refund on the Company's finances and income, the Department rejected a one-year return of the overcollection and instead permitted the Company to return the amounts over a period not to exceed 139 months as "an appropriate balance between the need to make ratepayers whole for the overcharges and the need to maintain the financial integrity of the Company." *Id.* at 29. In addition, as we stated in the Order, adjustments to the CGAC do not raise the same retroactive ratemaking concerns as an adjustment to base rates. *Id.* at 16, 25. Because the CGAC is a reconciling mechanism, it does not raise the same concerns as an adjustment to base rates. *Cf. Boston Gas Company v. Department of Telecommunications and Energy*, No. 08538 (SJC filed January 30, 2001) (appealing whether the Department's decision to impose an accumulated inefficiencies factor

retroactively to November 1, 1999, violates the prohibition on retroactive ratemaking).

Therefore, there is no risk that Fitchburg would be harmed absent a stay.

We must balance this potential harm with the probability that absence of the requested stay will be harmful to other parties, namely the Company's ratepayers. It is not in the public interest to delay the return of the monies improperly collected from Fitchburg's ratepayers.

Finally, in this instance, we do not find that this case presents such far-reaching issues to require the Department to stay our final Order pending appellate review. For these reasons, we find that the balance of the equities or the public interest does not require granting Fitchburg's request for a stay.

With regards to the Company's Proposal for returning to ratepayers \$675,052 of inventory finance charges, the Department finds it reasonable. Because a mechanism already exists in the CGAC for collecting inventory finance charges, refunding these costs through the same mechanism is administratively efficient. Further, since the Company's inventory finance costs had been previously collected from customers during the peak winter months, it is appropriate that the Company refund these costs during this same period. The Company's proposal shall take effect with Fitchburg's September 2001 winter CGAC filing.

VI. ORDER

After review and consideration, it is

ORDERED: That the Motion of Fitchburg Gas and Electric Light Company for a Stay of the Department's Order in D.T.E. 99-66-A is DENIED; and it is

FURTHER ORDERED: That the Compliance Proposal of Fitchburg Gas and Electric Light Company for returning to ratepayers \$675,052 of inventory finance charges, plus accumulated interest, over a period not to exceed 139 months, is APPROVED.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner